

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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BANK OF AMERICA, N.A.,

Plaintiff,

-against-

BROOKLYN CARPET EXCHANGE, INC.,  
et al.,Defendants. :  
:  
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15 Civ. 5981 (LGS)

ORDER

LORNA G. SCHOFIELD, District Judge:

On July 30, 2015, Plaintiff Bank of America brought this action against Defendant Brooklyn Carpet Exchange, Inc. ("Brooklyn Carpet"), asserting claims for breach of contract, foreclosure of a security interest, replevin, conversion, and unjust enrichment for failure to repay a loan within the terms of the loan agreement. Plaintiff also asserted claims for breach of guaranty against Defendants Mark E. Simon and Roberta K. Simon. Following an entry of default judgement against Brooklyn Carpet on October 27, 2015, the Court referred the matter to Magistrate Judge Debra Freeman for a report and recommendation on damages.

Judge Freeman set a schedule for Plaintiff to submit proposed findings of fact and conclusions of law regarding damages and cautioned Defendants that if they failed to respond to Plaintiff's submission or to contact the Court to request a hearing by December 30, 2015, then the Court would issue a Report based on Plaintiff's submission alone. Defendants Mark E. Simon and Roberta K. Simon filed for bankruptcy on November 13, 2015, in the United States Bankruptcy Court for the Southern District of New York, and therefore this action is stayed as to these Defendants. Brooklyn Carpet neither filed any response to Plaintiff's submissions nor did it contact the Court to request a hearing.

Judge Freeman filed the Report and Recommendation (the "Report") on May 13, 2016,

recommending that Plaintiff be awarded damages against Brooklyn Carpet of \$1,388,628.58 (representing \$1,328,972.14 in outstanding principal, \$28,512.68 in unpaid interest, \$26,861.78 in attorneys' fees, and \$4,281.98 in costs), plus additional interest calculated at the rate of \$136.38 per day, from September 28, 2015, until the date of entry of a final judgement in this action. Judge Freeman made no recommendation as to damages to be awarded against Mark and Roberta Simon because of the bankruptcy stay.

## **I. BACKGROUND**

The facts relevant to Brooklyn Carpet's liability and damages are set out in greater detail in the Report and summarized here. This action arises out of Brooklyn Carpet's failure to comply with its contractual obligations to Plaintiff.

On or about January 28, 2014, Plaintiff entered into a loan agreement ("Loan Agreement") with Brooklyn Carpet, under which Plaintiff agreed to make available a revolving line of credit in the amount of \$1.4 million until February 28, 2015. Brooklyn Carpet also executed a security agreement (the "Security Agreement") whereby Brooklyn Carpet granted Plaintiff a first priority security interest in all of its assets, whether in existence at the time of execution or thereafter acquired. Both the Loan Agreement and the Security Agreement were signed by Mark Simon and Roberta Simon in their capacities as officers of Brooklyn Carpet. Mark Simon and Roberta Simon also each executed a personal guaranty, whereby they individually and unconditionally guaranteed Brooklyn Carpet's obligations under the Loan Agreement.

Brooklyn Carpet regularly made interest payments from March 1, 2014, until the expiration date, but failed to repay the entire amount of the outstanding principal and interest at that time, as required under the Loan Agreement. The terms of the Loan Agreement provided

that Plaintiff could declare Brooklyn Carpet in default and demand immediate repayment of the debt under certain circumstances, including if Brooklyn Carpet failed to make a payment when due. The Loan Agreement also provided that Brooklyn Carpet would be required to reimburse Plaintiff for any reasonable attorneys' fees and costs, among other terms.

## **II. STANDARD**

A district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). The district court "may adopt those portions of the report to which no 'specific, written objection' is made, as long as the factual and legal bases supporting the findings and conclusions set forth in those sections are not clearly erroneous or contrary to law." *Adams v. N.Y. State Dep't of Educ.*, 855 F. Supp. 2d 205, 206 (S.D.N.Y. 2012) (citing Fed. R. Civ. P. 72(b); *Thomas v. Arn*, 474 U.S. 140, 149 (1985)).

## **III. DISCUSSION**

With respect to the Brooklyn Carpet's liability, the Report finds that Plaintiff has established with reasonable certainty that it is entitled to \$1,328,972.14 in outstanding principal. The Report also finds that Plaintiff has adequately supported its claim that the final amount of interest owed by Brooklyn Carpet as of September 28, 2015, the date upon which a default judgment was entered, totals \$28,512.68, and recommends that Plaintiff be awarded damages representing unpaid interest at the rate of \$136.38 per day, from September 28, 2015, until the date that a final judgment awarding damages is entered in this action.

Regarding attorney's fees, the Report determined that Plaintiff is entitled to reasonable costs and attorneys' fees incurred in connection with the enforcement of the Loan Agreement. The Report found that the attorneys' and paralegal hourly rates requested are reasonable, but that

the amount of time billed was at least somewhat excessive. Although the attorneys reduced their fees across the board by five percent, the Report recommends that the hours requested be reduced in three categories of work by an additional 20 percent, for a total reduction of 5 percent in two categories of work and 25 percent in three categories of work. Consequently the Report recommends attorney's fees of \$26,861.78. The Report also recommends an award of \$4,281.98 in reasonable litigation costs.

Having reviewed the Report, to which no objection was made, the Court finds no clear factual or legal error and adopts the Report in its entirety.

#### **IV. CONCLUSION**

The Clerk of Court is directed to enter judgment for Plaintiff Bank of America against Defendant Brooklyn Carpet as follows:

1. **\$1,388,628.58** in total damages, representing \$1,328,972.14 in outstanding principal, \$28,512.68 in unpaid interest, \$26,861.78 in attorneys' fees, and \$4,281.98 in costs; and
2. Additional interest calculated at the rate of \$136.38 per day, from September 28, 2015, until the date of entry of a final judgement in this action.

The Clerk of the Court is directed to mail a copy of this Order together with the May 16, 2016, Report to Brooklyn Carpet at its New York Department of State process address:

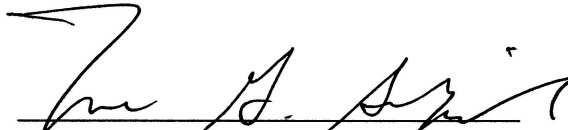
Brooklyn Carpet Exchange, Inc.,  
7 West 36<sup>th</sup> Street, 5<sup>th</sup> Floor,  
New York, New York 10018

and to Mark E. Simon and Roberta K. Simon at their last known address:

Mark E. Simon & Roberta K. Simon  
6 White Birch Lane  
Scarsdale, New York 10583

SO ORDERED.

Dated: June 27, 2016  
New York, New York



**LORNA G. SCHOFIELD**  
**UNITED STATES DISTRICT JUDGE**